

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

PHILLIP DAVISSON, WILLIAM DAVISSON, OSCAR SCHERRER
and WARNER SCHERRER, d/b/a SCHERRER AND DAVISSON
LOGGING COMPANY, *Respondents.*

PETITION FOR REHEARING

PATTERSON, MAXWELL & JONES
Attorneys for Respondents.

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Seattle 11, Washington.

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PHILLIP DAVISSON, WILLIAM DAVISSON,
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d/b/a SCHERRER AND DAVISSON LOGGING
COMPANY,

Respondents.

No. 14463

PETITION FOR REHEARING

To: THE HONORABLE ALBERT LEE STEPHENS, WILLIAM HEALY and WALTER L. POPE, Judges of the above entitled court:

The respondents above named respectfully petition the Court to grant a rehearing in the above-entitled matter and in support thereof respectfully show the Court as follows:

I.

The above-entitled case was argued in Seattle, King County, Washington, on the 25th day of April, 1955, before the Honorable Albert Lee Stephens, William Healy and Walter L. Pope, and the decision of the Court decreeing and directing the entry of an Order of Enforcement was filed herein on the 26th day of April, 1955.

II.

Respondents, by answer to the application of the National Labor Relations Board for an Order of Enforce-

ment and by the Brief of respondents heretofore filed herein, raised the objection that the decision of the trial examiner and the findings of the National Labor Relations Board and the trial examiner were not supported by a preponderance of substantial evidence.

III.

The *Per Curiam* Opinion filed herein states:

“The evidence pro and con is in conflict throughout. That produced by the general counsel would, *if believed*, not only support but would conclusively establish the truth of the charge made against the respondents. But the latter contended that the testimony accepted by the Board is inherently incredible. We do not so regard it. *Thus we have before us merely a question of credibility, which is not one for this Court to resolve.*

“*The findings of the Board are substantially supported by the record considered as a whole.*”
(Emphasis supplied)

IV.

It is respectfully submitted that the language of the Court's decision in this case quoted above raises substantial uncertainty as to whether the Court has rested its decision on the question of credibility alone or whether the Court did review the record as a whole and independently conclude that the Board's findings were supported by a preponderance of substantial evidence. While it is true that some of the evidence in the case is in conflict, it is likewise true that some of the evidence produced by general counsel supported the respondents' case and that the record is replete with evidence which is not in conflict.

While the decision concludes with the statement that
 “the findings of the Board are substantially supported upon the record considered as a whole,”

this conclusion can only be interpreted in the light of the preceding sentence, that is,

“Thus we have before us merely a question of credibility, which is not one for this Court to resolve.”

The specific statement that the question is one of credibility and therefore not one for this Court not only impeaches the final conclusion referring to the record as a whole but is clearly and unequivocally indicative that the Court’s review of the record was limited to the credibility of the witnesses whose testimony was relied upon by the Board and further indicates that, since this question was uppermost in the Court’s mind, the issue of whether or not the findings of the Board were supported by substantial evidence based on the record as a whole was not considered by the Court.

The statement of this Court in its decision that the question presented is one of “credibility” seems to conclusively infer that reference was made only to the testimony of General Counsel’s witnesses upon which the Trial Examiner and the Board saw fit to rely to support the findings. The Board did not see or observe the witnesses. The Trial Examiner made no reference to undisputed evidence which preponderated against his ultimate findings. He made no reference to the demeanor of witnesses as affecting their credibility. He cited no reasons for not accepting undisputed testimony. He stated no reasons for not accepting Respondents’ denials of General Counsel’s witnesses whose testimony he obviously viewed in isolation. He did not weigh

against the testimony upon which he relied objective and undisputed facts in the record which substantially detracted therefrom. Thus he failed to follow and observe the mandates of Congress clearly set out in the Joint Conference Report (House Report 510 Eightieth Congress, pages 53, 54. See Respondents' Brief, pages 12 and 13).

"Credibility" is defined as "worthiness of belief." (Bouvier's Law Dictionary, Baldwin's Student Edition 1928).

The substantial evidence on the record as a whole test does include consideration of credibility of evidence. It requires the reviewing court to consider related facts such as circumstances under which alleged statements were made and undisputed facts as affecting the probable truthfulness of the alleged statements and the weight to be given thereto.

The test of substantial evidence is not met "when the reviewing Court could find in the record evidence which, when viewed in isolation, substantiates the Board's findings." The act requires all credible evidence appearing in the record as a whole to be considered and weighed. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 478.

The record shows the respondents were not anti-union. Mr. Cook had never been in the employ of respondents.

There is no evidence of union strike activity except that Mr. Cook, along with thousands of other workers throughout the Northwest, was on strike in 1952 and

that Mr. Cook along with employees of two companies, including the one for which he worked, participated in a strike over local issues. No special strike activity is shown on the record. The record fails to establish the necessary condition precedent to the issuance of an order of enforcement. *N.L.R.B. v. Citizens News Co.* (C.A. 9) 134 F.(2d) 970.

In conclusion, it is respectfully submitted that a rehearing should be granted herein for the reasons stated above.

PATTERSON, MAXWELL & JONES,
By R. W. MAXWELL,
Attorneys for Respondents.

Certificate of Attorney

R. W. Maxwell, of Patterson, Maxwell & Jones, attorneys for respondents herein, hereby certifies that in his judgment the Petition for Rehearing is well founded and that it is not interposed for the purpose of delay.

R. W. MAXWELL.

